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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIAM ALYASINI,

Defendant and Appellant.

D073827

(Super. Ct. No. SCD275462)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Affirmed.

Taylor L. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Tami Hennick and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

By amended complaint, the People charged defendant Mariam Alyasini with using personal identifying information of another (Pen. Code,<sup>1</sup> § 530.5, subd. (a); count 1), possession of forged items (§ 475, subd (a); count 2), and possession for sale of a designated controlled substance (Health & Saf. Code, § 11375, subd. (b)(1); count 3). Alyasini pleaded guilty to count 1, and in exchange the People dismissed the other charges. She agreed to a "Harvey waiver," permitting the sentencing court to consider her criminal history and the case's factual background, including unfiled, dismissed and stricken charges. (*People v. Harvey* (1979) 25 Cal.3d 754.)

The court placed Alyasini on three years formal probation, ordering her to serve 137 days in custody. It imposed as a probation condition an electronic search requirement that Alyasini "[s]ubmit [her] person, vehicle, residence, property, personal effects, computers, and recordable media including electronic devices to search at any time with or without a warrant, and with or without reasonable cause, when required by [a probation officer] or law enforcement officer."

Alyasini contends the electronic search condition is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), unconstitutionally overbroad, and violates the California Electronic Communications Privacy Act (§ 1546 et seq.; "ECPA"). We reject these contentions and affirm the judgment.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

In January 2018, as part of an operation with the Department of Homeland Security, San Diego Police Department officers multiple times observed Alyasini and her boyfriend in a parking lot going to and from a car that had no license plates. When police later stopped the car, Alyasini was driving and her boyfriend, the car's owner, was the passenger. Police arrested him because he had an active felony warrant for cocaine sales. Alyasini falsely identified herself using the name of a relative who is in the military. Police discovered that Alyasini had an outstanding warrant for driving under the influence and resisting arrest for an incident in which she had been speeding at 120 miles per hour with a blood alcohol level of .13 percent. She eventually gave police her true name, explaining she was afraid that she and her boyfriend would be arrested.

Officers discovered 40 fake or counterfeit \$100 bills in the car. Alyasini said they were used in making a music video. A video camera was also found in the car. Police found a pill capsule and a small vial both of which contained a white powdery substance that they believed was cocaine. However, Alyasini and her boyfriend said the substance was a vitamin, and tests proved that was correct. Police found in Alyasini's purse 138 pills marked "Xanax", which she said were prescribed to her. The pills later tested negative for Xanax.

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<sup>2</sup> The facts are taken from the probation report and preliminary hearing transcript as this appeal follows a guilty plea.

The probation officer discussed the serious nature of Alyasini's crimes: "Even though [she] does not have a lengthy criminal history, the facts of the instant offense and [the misdemeanor case involving the DUI] are serious, in that they indicate a level of non-compliance. Her failing to appear to Court in [the other case] and then attempting to allude [*sic*] officers by providing her [relative's] name upon contact, are not the actions of an individual who is ready and willing to take responsibility. Not to mention, the fact [Alyasini's] taking the name of a person serving in the military and using it in an effort to avoid her own arrest could be detrimental to the victim whose name was falsely used." The probation office recommended the electronics surveillance probation condition to ensure Alyasini desist from contacting her boyfriend, and that she "is not seeking contraband that [is] counterproductive to her rehabilitation."

## DISCUSSION

In the trial court, Alyasini objected to the probation department's request to include an electronic search condition on the same grounds as on appeal. The court denied Alyasini's challenge to the electronic search condition: "I am going to impose the electronic devices search condition based on the offense. I think that it is necessary for probation to monitor based on the facts and [her] unlawfully having personal identifying information, the Xanax, and other circumstances. I do think there is a nexus."

### *I. Legal Principles and Standard of Review*

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the

breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' (§ 1203.1, subd. (j).)

Accordingly, . . . a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to . . . section 1203.1.' [Citation.] But such discretion is not unlimited: '[A] condition of probation must serve a purpose specified in the statute,' and conditions regulating noncriminal conduct must be ' "reasonably related to the crime of which the defendant was convicted or to future criminality." ' " (*People v. Moran* (2016) 1 Cal.5th 398, 402-403.)

"[T]he types of conditions a court may impose on a probationer are not unlimited. We first recognized the limits on probation conditions in the seminal case of [*Lent*, *supra*,] 15 Cal.3d 481 . . . . 'Generally, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.' " (*People v. Moran, supra*, 1 Cal.5th at p. 405.)

Appellate courts generally review probation conditions for abuse of discretion. (*People v. Moran, supra*, 1 Cal.5th at p. 403; *People v. Acosta* (2018) 20 Cal.App.5th 225, 229.) Thus, "a reviewing court will disturb the trial court's decision to impose a

particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*Moran*, at p. 403.) But constitutional challenges, such as a claim that a condition is overbroad, are reviewed de novo. (*People v. Acosta*, at p. 229; *People v. Stapleton* (2017) 9 Cal.App.5th 989, 993.)

## II. *Electronic Search Condition*

Alyasini challenges the electronic search condition under *Lent*, *supra*, 15 Cal.3d 481 as having no relationship to her conviction for using personal information of another, involving conduct not itself criminal, and not reasonably related to her future criminality. Comparing her case to *In re Erica R.* (2015) 240 Cal.App.4th 907 and *In re J.B.* (2015) 242 Cal.App.4th 749 involving crimes of misdemeanor possession of ecstasy and petty theft respectively, and pointing out cell phones are now ubiquitous, she argues there is nothing about her current or past offenses or her personal history that demonstrates a predisposition to use electronic devices in connection with criminal activity. Alyasini further contends the condition is unrelated to her future criminality and thus the record does not establish the required factual nexus between her conviction, her personal history, and imposition of warrantless and unrestricted searches of her electronic storage devices. Alyasini finally contends the condition is unconstitutionally overbroad and violates her privacy rights under *Riley v. California* (2014) 573 U.S. 373 (*Riley*).

The People argue that the challenged electronics search condition was related to Alyasini's crimes: "Every aspect of [Alyasini's] current and prior criminal conduct involved an enterprise of deception and a failure to cooperate with law enforcement or comply with lawful court orders. [She] had two kinds of phony drugs in three different

containers, \$4000 in counterfeit money and a video camera. She adamantly insisted her [relative's] name was her own even when police confronted her with the discrepancy. She had a warrant out for her arrest in a case involving grave danger to public safety, where she resisted arrest after being pulled over for speeding at 120 miles per hour with a blood alcohol level of .13 [percent]." The People alternatively argue that even if Alyasini's conviction had no such relationship, the probation condition is reasonably related to her supervision and to her rehabilitation and preventing potential future criminality. Specifically, they argue the condition will allow law enforcement to supervise Alyasini more effectively because it aids the probation department in monitoring and ensuring her compliance with the terms of her probation. They add, "Such a condition is especially important in this case given [Alyasini's] pervasive dishonesty and disregard for official orders. . . . Permitting probation officers to search her electronic devices . . . could easily reveal evidence of [her] continued involvement in a criminal enterprise that would violate [her] probation and jeopardize community safety."

*A. The Condition is Reasonable under Lent*

We agree with the People that the electronics search condition meets the reasonableness standard for preventing future criminality under *Lent*.<sup>3</sup> As this court pointed out in *People v. Trujillo* (2017) 15 Cal.App.5th 574, 583, review granted

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<sup>3</sup> Many cases dealing with the validity of electronic search conditions are pending review in the California Supreme Court, with the lead case being *In re Ricardo P.* (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.)

November 29, 2017, S244650, our Supreme Court has made clear that a "condition of probation that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality.'" (*People v. Olguin* (2008) 45 Cal.4th 375, 380-381; see also *People v. Valdivia* (2017) 16 Cal.App.5th 1130, 1138, review granted Feb. 14, 2018, S245893.) In *Valdivia*, the court pointed out that to meet this requirement, the condition need not have a specific connection to the facts of the defendant's offense or other past criminal conduct, and it need not have a tendency to preclude a defendant from engaging in similar criminal conduct in the future. (*Id.* at pp. 1137-1138.) Rather, " 'probation conditions authorizing searches "aid in deterring further offenses . . . and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.'" ' [Citations.] . . . '[A] warrantless search condition is intended to ensure that the subject thereof is obeying the fundamental condition of all grants of probation, that is, the usual requirement . . . that a probationer "obey all laws." Thus, warrantless search conditions serve a valid rehabilitative purpose, and . . . such a search condition is necessarily justified by its rehabilitative purpose.'" (*Valdivia*, at p. 1138.) The *Valdivia* court concluded: "Like most, if not all, probationers, defendant here was ordered as a condition of probation to '[o]bey all laws applicable to [him]'. Given this condition, the fact that defendant may not have shown any predisposition to use an electronic storage device like a cell phone or computer for purposes of criminal activity . . . does not render the electronic storage device search condition unreasonable under *Lent*. The electronic



storage device search condition—like the rest of the search conditions (to which defendant did not object)—serves to enable defendant's probation officer to supervise him effectively by helping the probation officer ensure that defendant is complying with the conditions of his probation by obeying *all* laws, not just the law he previously disobeyed . . . . Because the electronic storage device search condition serves this valid rehabilitative purpose, it is reasonably related to future criminality and thus satisfies the *Lent* test." (*Id.* at pp. 1138-1139.)

All of these conclusions apply to Alyasini's condition. The probation officer's report recounted the seriousness of Alyasini's crime. When police stopped her for engaging in suspicious conduct using a vehicle with no license plates, she lied about her identity and used her relative's identity. The police found fake or counterfeit money in the car, along with a digital video camera, an electronic device that Alyasini said was used for taping a music video in which the money would appear. Alyasini was with her boyfriend, who had an outstanding warrant for a felony drug charge. Alyasini had previously failed to appear in court on her other case involving drunk driving in excess of the speed limit. Under these circumstances, the trial court here had a reasonable basis to conclude Alyasini could be assisted by a probation condition that helped her avoid future criminality. It could decide that an effective way to confirm her compliance would be to permit her electronic devices to be examined, rather than merely relying on meetings and telephone conversations with probation officers. (Accord, *People v. Trujillo*, *supra*, 15 Cal.App.5th at pp. 583-584, rev. gr.) For the above reasons articulated by the *Valdivia*

court, we conclude the electronics search condition is not unreasonable under *Lent* as applied to Alyasini.

*B. The Electronics Search Condition is Not Unconstitutionally Overbroad*

Alyasini contends the electronics search condition is overbroad: "Electronic search conditions allow law enforcement and the probation department unfettered access to intimate details of a probationer's life and would, in effect, allow law enforcement to continually monitor the probationer's communications, locations, and associations." She relies on the United States Supreme Court's observation in *Riley supra*, 573 U.S. at pp. 385-386 as to the breadth of data on a cell phone, and argues *Riley* makes clear such searches implicate privacy concerns beyond those of a traditional search.

A condition should be invalidated as overbroad when it imposes limitations on a person's constitutional rights that are not closely tailored to the purpose of the condition. (*People v. Acosta, supra*, 20 Cal.App.5th at p. 229, citing *In re Sheena K.* (2007) 40 Cal.4th 875, 890.) " 'A restriction is unconstitutionally overbroad . . . if it (1) "impinge[s] on constitutional rights," and (2) is not "tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation." [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*People v. Stapleton, supra*, 9 Cal.App.5th at p. 993.)

We reject Alyasini's overbreadth challenge on its premise, that is, that *Riley's* analysis of Fourth Amendment protections applies to her. In *Riley*, the court held the warrantless search of *an arrestee's* cell phone implicated and violated the individual's Fourth Amendment rights. (*Riley, supra*, 573 U.S. at p. 403.) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at pp. 393-394.) The court emphasized, however, that its holding was that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id.* at p. 401.)

Unlike the defendant in *Riley* who had not been convicted of a crime and was still protected by the presumption of innocence, Alyasini is under probation supervision, and thus her privacy rights are diminished and may more readily be burdened by restrictions that serve a legitimate purpose. (See *United States v. Knights* (2001) 534 U.S. 112, 119 [probationer does not " 'enjoy "the absolute liberty to which every citizen is entitled" ' "]; *People v. Trujillo, supra*, 15 Cal.App.5th at 574, rev. gr.; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1129, review granted December 14, 2016, S238210; *In re J.E.* (2016) 1 Cal.App.5th 795, 805, review granted October 12, 2016, S236628.) In *People v. Trujillo*, this court made the same observation, pointing out that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id.* at pp. 587-588.) Like the defendant in *Trujillo*, at pages 588-589, Alyasini does not challenge the probation condition authorizing officers to conduct random and unlimited searches of her residence at any time and for no stated

reason, and she made no showing that a search of her electronic devices would be any more invasive than an unannounced, without-cause, warrantless search of her residence. Here, as in *Trujillo*, the record supports a conclusion that the electronic device search condition is necessary to protect public safety and to ensure Alyasini's rehabilitation during her probation period, and a routine search of her electronic data "is strongly relevant to the probation department's supervisory function." (*Id.* at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [Alyasini's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly-drawn condition." (*Id.* at p. 589.) On this record, we conclude the burden on Alyasini's privacy is insufficient to show overbreadth, given the legitimate penological purpose shown for searching her electronic devices.

Finally, Alyasini contends the electronics search condition violates the ECPA, as "*the presumption is almost irresistible that the Legislature intended the ECPA to create greater privacy protections than the Fourth Amendment.*"

As relevant here, the ECPA, effective January 1, 2016, prohibits a government entity from accessing device information through physical interaction or electronic communication with the device *unless* one of several statutory exceptions applies. One of the exceptions is that "the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release." (§ 1546.1, subds. (a)(3), (c)(10).)

Here, Alyasini is on formal probation; thus, the electronics search condition does not violate the ECPA. (§ 1546.1, subd. (c)(10).)

DISPOSITION

The judgment is affirmed.

O'ROURKE, Acting P. J.

WE CONCUR:

IRION, J.

GUERRERO, J.